INDEX

CITATIONS

672299—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioner's conviction of contempt of court (R. 354–358) has not yet been reported. The court's supplemental opinion upon petition for rehearing, which is not included in the transcript of record (cf. fn. 1, p. 12, *infra*), is copied in the Appendix, *infra*, pp. 18–19.

JURISDICTION

The judgment of the Court of Appeals was entered April 30, 1945 (R. 359), and a petition for rehearing was denied May 8, 1945 (R. 360).

By orders of the Chief Justice and Mr. Justice Black the time within which to file a petition for a writ of certiorari was extended to October 3, 1945, and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of petitioner's guilt.

2. Whether the misbehavior of petitioner, an attorney representing certain defendants in a pending criminal trial, was punishable under the contempt statute.

3. Whether petitioner was entitled to trial by jury.

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides, so far as pertinent:

> The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, * * *.

STATEMENT

On May 10, 1944, petitioner was adjudged in contempt of the District Court of the United States for the District of Columbia following a hearing before Justice Jennings Bailey of that court, and was sentenced to pay a fine of $150 (R. 181–183).

The petition for an order to show cause why petitioner should not be held in contempt (R. 1–11) alleged that petitioner was a member of the bar of the District of Columbia, and was attorney of record for Robert Noble and Edward James Smythe, two of the defendants in the case of *United States* v. *Joseph E. McWilliams et al.*, which came on for trial in the District Court for the District of Columbia on April 17, 1944, before the late Chief Justice Edward C. Eicher; that on April 14, prior to commencement of the trial, the court ruled that it would not consider motions for the summoning of defense witnesses at Government expense until approximately two weeks before the close of the Government's case, which was expected by both sides to take at least two months; that on April 20, 1944, the selection of a jury began; that on three separate days thereafter, April 24, 26, and 29, during the impaneling of the jury, petitioner filed in court motions to summon witnesses containing sensational allegations involving well-known persons which were not remotely pertinent to the case on

trial and which were not intended to accomplish any legally proper purpose in connection with the defense of petitioner's clients, but were filed merely as an excuse and as a vehicle for making statements to the public press concerning the motions for the sole purpose of bringing to the attention of members of the jury panel allegations of matters which were not admissible in evidence and charges which would cause the prospective jurors to form opinions as to the guilt or innocence of the defendants in order either to disqualify or improperly to influence them; that in continuance of his purpose, and with the additional aim of embarrassing the trial judge and coercing him to recuse himself, on April 26 petitioner filed an affidavit of bias and prejudice with the court, making scandalous, insulting, and scurrilous allegations attacking the integrity of the trial judge and the court, without attempting in good faith to pursue the statutory requisites for the privileged filing of such a document; and that petitioner's actions tended to and did obstruct the due administration of justice.

The relevant facts established at the hearing and admitted by petitioner's answer to the order to show cause, are as follows:

The charge against petitioner's clients in the case of *United States* v. *Joseph E. McWilliams et al.* was that of conspiring to impair the morale of the armed forces (18 U. S. C. 9), in violation of 18 U. S. C. 11 (R. 261–270).

On April 14, 1944, petitioner had submitted a motion to subpoena, at Government expense, General Short and Admiral Kimmel on behalf of his client Robert Noble. At that time and on April 17, the first day of trial, the court ruled, the Government acquiescing, that it would not consider motions of this nature until approximately two weeks before the close of the Government's case, which it was expected by both petitioner and the Government would take several months. (R. 140, 175, 213, 214, 250–252.)

On Sunday, April 23, petitioner took to the office of a newspaper reporter, for publication, a copy of a motion, on behalf of his client Smythe, to summon Henry Ford and Charles A. Lindbergh, informing the reporter he would file it the following day (R. 41–42). The motion was filed on Monday, April 24, alleging that the prosecution was brought in bad faith by the Roosevelt administration at the direction of influences inimical to the best interests of the Government, and that the testimony of Ford and Lindbergh would show that they had made anti-Semitic statements more pronounced than any of the writings of the defendant Smythe, but, nevertheless, were not prosecuted for sedition (R. 2, 18, 258–260).

On the same Monday, petitioner turned over to a newspaper reporter, for publication on Tuesday, a copy of a letter addressed to the President of the United States, making similar charges, and, in addition, that certain unknown influences had

prevailed on the administration to initiate the prosecution to "smear" the names of certain high patriotic officials; that if the prosecution was not halted, the developments at the trial would create a wave of hostility toward the Jewish race; and that the trial would continue until the following election day when there would be a change of administration (R. 9, 54).

On the following day, Tuesday, April 25, petitioner turned over to still another newspaper reporter, for publication on Wednesday, a copy of a motion, on behalf of Smythe, to be filed to summon Congressman Martin Dies, Attorney General Francis Biddle, and Justice Matthew F. McGuire (R. 10, 23–24). The motion made allegations similar to the previous document, and, in addition, charged that Dies had attempted to warn the United States of the Japanese attack, but had been frustrated by Biddle and McGuire, as Acting Attorney General. Petitioner filed this motion on Wednesday, April 26. (R. 4, 7, 313–318.)

On Wednesday, April 26, petitioner also transmitted to the office of a newspaper reporter, for publication the following day, an alleged affidavit of bias and prejudice against the trial judge, which he filed the same day in court (R. 55, 74, 150, 172, 321–322). The affidavit alleged that some two years before the trial, the President had called in Attorney General Biddle and directed him to institute the prosecution of the *McWilliams* case; that the Attorney General replied that there was

no possibility of securing a conviction, but that the President said he would pick the judge before whom the case would be tried; that shortly thereafter the President appointed Chief Justice Eicher to the District Court bench; that the President had promised Chief Justice Eicher a higher judgeship if he would secure convictions in the *McWilliams* case; and that Chief Justice Eicher would do his utmost to convict the defendants. The affidavit, sworn to by petitioner's client Noble, stated that it could not have been filed sooner due to the fact that the information contained therein came to the client's attention only on Tuesday, April 25, and it was filed at the earliest possible date. Petitioner certified that the affidavit was filed in good faith and not for the purpose of delay. (R. 321–322.)

On Saturday, April 29, petitioner prepared and had Smythe swear to two motions; one to summon the then Director of War Mobilization, James F. Byrnes, and the other to summon Harry Hopkins and David Niles, Administrative Assistants to the President (R. 177–178). The substance of the first motion was that Byrnes had visited Germany, made statements complimentary to the Nazi regime, and had given the Nazi salute (R. 319–320). The second motion charged that the prosecution was part of an "unholy conspiracy," that Hopkins and Niles had taken some part in the prosecution and participated in other matters, such as

the attempt to "purge" Senator Guy M. Gillette in the 1938 election (R. 256–257). On the same day, petitioner showed a copy of the motion to summon Byrnes to a newspaper reporter, and told him he would file another motion to summon Hopkins and Niles on the following Monday (R. 61–63, 177). Only the first of these motions was, in fact, filed; that motion was filed on Saturday, April 29, (R. 177–179). The order to show cause was served upon petitioner on the same day (R. 12).

Additional evidence will be discussed in the Argument.

Following the hearing, Justice Bailey held that petitioner's purpose in filing the motions and the affidavit was to gain publicity in order to embarrass the trial judge and influence prospective jurors as to the guilt or innocence of the defendants, and that the charges of the contempt petition were substantially established by the evidence (R. 181–183).

The Court of Appeals for the District of Columbia affirmed (R. 359).

ARGUMENT

I

Contrary to petitioner's contention (Pet. 4, 8, 12–21), we submit that the evidence is amply sufficient to sustain the conviction.

The motions filed by petitioner clearly showed that the desired testimony of the individuals named therein could not even remotely be perti-

nent to the issues on trial and that petitioner, an attorney of considerable experience (see R. 153), could not have believed them so. The statute, D. C. Code (1940), Title 23, § 109, requires that, except in "cases of manifest necessity," motions to summon defense witnesses at Government expense be filed prior to trial. The evidence showed that, with the acquiescence of the Government, the trial court had ruled, to petitioner's knowledge, that it would not consider such motions until shortly before the close of the Government's case, which both petitioner and the Government anticipated would take several months. It was also shown without dispute that the names of the persons listed in the motions had not just been given to petitioner by his client Smythe from day to day during the choosing of the jury, but at least a month before the trial began. (R. 126–130, 140.) Further evidence of petitioner's purpose in filing the motions was shown by his conduct in the courtroom on April 24, when he, one of 22 defense counsel, personally challenged 22 of 45 jurors excused because they had read about the case in the newspapers and formed fixed opinions concerning it (R. 48–49, 221–224). When four of approximately 90 jurors indicated they had not read anything about the case, petitioner remarked, "I must be slipping" (R. 50–51, 52).

Hence, Justice Bailey could properly infer that the filing of the separate motions on different days during the selection of the jury was "not

to protect the interest of his clients, but to embarrass the trial justice in his handling of the case, and to cause unnecessary delay by giving to the press copies of his proposed motions, for the purpose largely of making the panel of prospective jurors incompetent, and for the purpose of bringing to the public the charges which he was making, and thereby to render it still more difficult to obtain a jury for the trial of the case" (R. 181, 183).

As the Court of Appeals stated, the filing of the motions was of comparatively minor importance compared with petitioner's certifying to the good faith of the affidavit of bias and prejudice sworn to by his client Noble (R. 358). His actions in this respect were plainly contempt of court without more. The statute, 28 U. S. C. 25, requires that such an affidavit "shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file within such time." It also requires that the affidavit be accompanied by a certification of counsel of record that it is made in good faith.

The evidence at the hearing showed clearly that neither petitioner nor his client was in possession of any facts to support the statements in the affidavit of bias and prejudice. Noble testified that the information contained in the affidavit was derived mainly from rumors he had heard in

jail, and he was vague concerning the sources of such rumors (R. 93–104, 111–114). Petitioner admitted that he did not believe Noble (R. 144–145). He did not investigate any of Noble's informants, nor even obtain their names, and he did not make any investigation independent of Noble (R. 156, 161–162). Moreover, while Noble swore in the affidavit that the information contained therein had come to his attention only the day before, all the information embodied in the affidavit was known to both petitioner and Noble at least a month before the trial (R. 88, 93–99, 114, 156–157, 171). It is evident, therefore, that there was no basis for the certificate of petitioner, as counsel, that the affidavit was filed in good faith.

The trial court was, consequently, fully justified in finding that the affidavit, like the motions to summon witnesses, was filed "to gain publicity of the charges made in the affidavit in order to embarrass the trial judge and for the purpose of bringing to the attention of prospective jurors these charges in order that they might form an opinion as to the case and prejudge the guilt or innocence of the defendant" (R. 182–183). The reckless attack embodied in the affidavit upon the integrity of the trial court, not in pursuance of any proper or legal purpose, clearly constituted contempt of court. Cf. *Cooke* v. *United States,* 267 U. S. 517; *Froelich* v. *United States,* 33 F. 2d 660, 663 (C. C. A. 8); *Mitchell* v. *United States,*

126 F. 2d 550, 552 (C. C. A. 10), certiorari denied, 316 U. S. 702; *American Brake Shoe and Foundry Co.* v. *I. R. T. Co.*, 6 F. Supp. 215, 219 (S. D. N. Y.); *United States* v. *Ford*, 9 F. 2d 990, 992 (D. Mont.); *In re Paris*, 4 F. Supp. 878, 884 (S. D. N. Y.); *Hume* v. *Superior Court*, 17 Cal. (2d) 506 (1941).

II

Petitioner also contends (Pet. 4, 8–10) that his actions did not take place in the presence of the court or "so near thereto" in a geographical sense as to come within the prohibition of 28 U. S. C. 385, as construed in *Nye* v. *United States*, 313 U. S. 33, so that such actions could not be punished by the court, even if they did constitute contempt.[1] There is clearly no merit in this contention.

In the first place, the authority of a court to punish summarily for contempt is not limited to

[1] Petitioner states (Pet. 8) that "in the opinion of the United States Court of Appeals for the District of Columbia * * * no reference whatever is made to the case of *Nye* v. *United States*." However, in its supplemental opinion denying his petition for rehearing, the court pointed out that implicit in its earlier opinion was a rejection of petitioner's contention based upon the *Nye* decision. The court pointed out that some of petitioner's contempts actually took place in Chief Justice Eicher's courtroom, but stated that "the fact that, in carrying forward [petitioner's] plan to disrupt the trial, *some* of his acts were committed out of the *immediate* presence of the judge did not deprive the court of the right to deal summarily with the wrongful conduct. And there is nothing in the *Nye* case to the contrary." (Appendix, *infra*, p. 19.)

misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice, but extends to "the misbehavior of any of the officers of said courts in their official transactions." It is well settled that an attorney is an officer of the court within the meaning of this clause of the statute; as this Court said in *Clark* v. *United States,* 289 U. S. 1, 12, "deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office." See also *Ex parte Bradley,* 7 Wall. 364; *United States* v. *Green,* 85 Fed. 857 (C. C. Colo.); *Ex parte Davis,* 112 Fed. 139 (C. C. Fla.). Plainly, the conduct of petitioner in filing the various motions to summon witnesses and the affidavit of bias and prejudice, to which he affixed his spurious certificate, constituted misbehavior in his official transactions. For his actions occurred during the course of a trial in which he represented two of the defendants and pertained directly to the conduct of the trial (cf. *Matter of Michael,* No. 38, decided November 5, 1945.) Of course, the *Nye* decision has no application to this type of contempt.

But even under the rule of the *Nye* case, petitioner is in no better position.

The motions to subpoena witnesses at government expense and the affidavit of bias and prejudice, which were the bases of the contempt citation, were filed with the court. All the documents were filed during the actual progress of

the trial. And as the Court of Appeals pointed out in its supplemental opinion (*infra*, p. 18), the affidavit of bias and prejudice was placed on the Clerk's desk in Chief Justice Eicher's courtroom itself and the docket entry shows that it was denied the same day (R. 150). But whether the filing of these documents, which both courts below found obstructed the orderly administration of justice, occurred in the courtroom itself or in the clerk's office adjacent thereto, is unimportant. This Court has held that, within the meaning of the statute, "the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." *Savin, Petitioner,* 131 U. S. 267, 277.[2]

The *Nye* decision is therefore not controlling. It did not involve contempt in the presence of the court, but only the question whether misbehavior more than one hundred miles from the courthouse was "so near thereto" as to fall within the statute. The opinion does not overrule the *Savin* case or *Cooke* v. *United States,* 267 U. S. 517; on the contrary, it indicates an approval of the doctrine of those and similar cases (313 U. S.

[2] In the *Savin* case the misbehavior, an attempt to deter a witness from testifying, occurred in a witness room and in a hall of a courthouse. See also *Cooke* v. *United States*, 267 U. S. 517, where a derogatory letter respecting a trial just concluded and several others yet to be heard was delivered to the judge at his chambers.

at pp. 48–49); and the *Savin* case is cited as an instance of misbehavior in the presence of the court (313 U. S. at p. 49).[3]

III

Finally, petitioner asserts (Pet. 4, 10–12) that he was entitled to a jury trial on the contempt charges. He concedes that at common law a defendant in a contempt case was not entitled to trial by jury, but he urges that recent decisions of this Court, such as *Nye* v. *United States, supra,* and *Bridges* v. *California,* 314 U. S. 252, indicate that the right should be recognized. However, he makes no effort to point out in what respects those cases indicate a recognition of the right, and we are aware of nothing in either of them which purports to change the common law rule.

[3] *Schmidt* v. *United States*, 115 F. 2d 394 and 124 F. 2d 177 (C. C. A. 6), is not in point. In the second opinion the court held that the filing of certain affidavits in the clerk's office was not, under the circumstances of the particular case, an act committed in the presence of the court or so near thereto as to obstruct the administration of justice since it did not appear that the court was in session at the time. In the instant case, not only was the trial in progress when most of the motions and affidavits were filed, but they were very different from those filed in the *Schmidt* case, which were statements obtained from grand jury members regarding certain evidence presented to them. See 115 F. 2d at pp. 395–396. In any evcnt, we think the reasoning of the *Schmidt* decision is not consonant with the *Savin* decision, *supra*, which, as we have shown, was not overruled in the *Nye* case. Compare with the *Schmidt* case, *In re Presentment by Grand Jury of Ellison*, 44 F. Supp. 375 (D. Del.),

affirmed, 133 F. 2d 903 (C. C. A. 3), certiorari denied, 318 U. S. 791.

It has long been established that although proceedings to punish for criminal contempt have a number of characteristics of criminal proceedings, they are *sui generis* and are not criminal prosecutions within the purview of the Fifth and Sixth Amendments in respect to the mode of accusation and method of trial. *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, 39; *Savin, Petitioner, supra; Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 489; *Gompers* v. *United States,* 233 U. S. 604 ,610; *Ex parte Hudgings,* 249 U. S. 378, 383; *Myers* v. *United States,* 264 U. S. 95, 104–105. Appellant's reference to the development of the law of contempt in England (Pet. 11–12) is beside the point. The law on this question was settled by this Court in the *Eilenbecker* case, *supra* (134 U. S. at p. 36):

> If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or unsettled question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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